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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.
JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
MOTION *IN LIMINE* (NO. 8) TO
EXCLUDE THE TESTIMONY OF
STEVEN PACE**

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves to
exclude the testimony of Steven Pace, an expert witness noticed by the State. This motion is
supported by the following Memorandum of Points and Authorities.

SUPERIOR COURT
2011 JAN 24 PM 4:56
JEANNENE HOS. CLERK
BY: Ivy Rios

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The State seeks to introduce testimony from Steven Pace, an expert in corporate risk
4 management for adventure education programs such as Outward Bound, “to explain to the jury
5 how to look at an organization, what you would look at to decide whether it was adequately run.”
6 Transcript of Steven Pace Interview, 1/19/11, at 3:27–4:1. The State will elicit Mr. Pace’s
7 opinion on “the appropriate considerations that would be used to assess the program safety for the
8 types of events at Spiritual Warrior, including the sweat lodge ceremony; and what safety
9 measures should have been implemented for these types of activities.” Letter from Sheila Polk to
10 Truc Do and Luis Li, 1/7/11 (Exhibit A), at 2. Mr. Pace’s Expert Witness Reports indicate his
11 view that programs engaged in “adventure based learning” featuring activities such as rock
12 climbing and other outdoor learning activities require certain risk management practices. *See*
13 Pace Expert Witness Report, “Considerations Used to Assess Program Safety” (Exhibit B), at 1–
14 4. Such testimony—about best practices for a corporate entity—has no bearing in this *criminal*
15 homicide case against an individual defendant. Mr. Pace’s opinions must be excluded pursuant to
16 Arizona Rules of Evidence 401, 402, and 403.

17 First, Mr. Pace’s testimony lacks any nexus to the incident at issue or the State’s theory of
18 the case. The inference to be drawn from his testimony is that James Ray International (“JRI”),
19 as an entity, did or did not employ the risk management policies Mr. Pace would have
20 recommended. But there is simply no evidence or argument that the three deaths resulted from
21 the presence or absence of such risk management policies. This is not a case where injuries
22 occurred because, for example, equipment was in poor condition. *Cf.* Pace Report,
23 Considerations Used to Assess Program Safety, at 3. The State’s theory, instead, is that three
24 individuals died because Mr. Ray prevented them from leaving the sweat lodge. JRI’s training
25 manuals, logistics policies, and screening practices have no bearing on why three people chose to
26 remain in the lodge and whether Mr. Ray recklessly caused their deaths on October 8, 2009.

27 Moreover, if the State were to change course and argue that JRI’s risk management
28 policies *did* cause the three deaths, there would be no grounds for *any* criminal charges against

1 Mr. Ray. As an initial matter, it is not apparent that JRI had any *legal* duty to implement the sorts
2 of “gold-standard” practices that Mr. Pace will describe. Indeed, common experience suggests
3 that many adventure programs—from ballooning to river rafting to marathons to horseback
4 riding—do not. And if JRI did have such a duty, Mr. Ray could not be held individually,
5 criminally responsible for JRI’s corporate failure to meet it. Indeed, in light of the Due Process
6 demands of fair notice and precise definitions, Arizona courts have construed the criminal code to
7 prohibit criminal responsibility for a corporate officer’s failure to take action that the corporation
8 should have taken. Because there is no connection between Mr. Pace’s testimony and any
9 permissible basis for Mr. Ray’s criminal guilt, the testimony is inadmissible.

10 Finally, even if Mr. Pace’s testimony had any probative value, it would be appropriate for
11 exclusion pursuant to Rule 403 because of the unfair prejudice it would cause to Mr. Ray’s
12 defense. Expert testimony regarding the corporate “gold standard” for adventure outdoor
13 education programs would inject into this criminal reckless manslaughter trial entirely
14 inapplicable notions of civil negligence for a corporate entity. The questions asked of Mr. Pace—
15 should JRI have drafted a safety manual? should JRI have used different hiring criteria for its
16 staff?—would invite jurors to decide Mr. Ray’s guilt or innocence based on inapposite criteria.
17 Such questions would suggest to the jury that Mr. Ray could be guilty of the charged crimes
18 based on the wrong standard—civil negligence, not criminal recklessness—and based on the
19 conduct of the wrong actor—JRI, not Mr. Ray. This powerful, two-pronged confusion of the
20 issues is unacceptable in a criminal homicide trial and must not be permitted.

21 II. ARGUMENT

22 A. Mr. Pace’s testimony is not relevant to the charged crimes.

23 1. **Mr. Pace’s testimony is not probative of any facts actually in issue in** 24 **this case.**

25 Even in civil cases, an expert opinion regarding an accident is immaterial if it identifies
26 problems that do not relate to the actual injuries. *See, e.g., Menendez v. Paddock Pool Const.*
27 *Co.*, 172 Ariz. 258, 269 (App. 1991) (expert opinion that swimming pool was intrinsically
28 dangerous due to absence of a “deep end” and insufficient signage was “immaterial” where injury

1 occurred in the shallow end; the expert's affidavit "fail[ed] to provide any reasonable linkage
2 between the condition alleged and the injury"). Here, the risk management opinions Mr. Pace
3 offers do not bear on the accident that actually occurred or on any fact that is actually in issue in
4 this case.

5 In pursuing reckless manslaughter charges, the State's theory has been that Mr. Ray
6 criminally caused the deaths by preventing people from leaving the sweat lodge. Specifically, the
7 State seeks to introduce the testimony of Rick Ross, who intends to testify that Mr. Ray exercised
8 "control" over participants and caused them to "remain inside the sweat lodge until the sweat
9 lodge ceremony ended, notwithstanding becoming ill." *See, e.g.*, Letter from Bill Hughes to Truc
10 Do, 1/12/11 (Exhibit C), at 1. Under this theory, there is simply no relevance to the presence or
11 absence of Mr. Pace's recommended protocols for hiring, medical screening, program manuals,
12 or logistics. The State has never alleged that the deaths resulted from JRI's corporate risk
13 management policies. Nor would such an allegation have any basis in fact.

14 **2. Mr. Pace's opinions describe standards that do not pertain to JRI**
15 **seminars.**

16 In addition, Mr. Pace's opinions are irrelevant because they pertain to outdoor adventure
17 education programs that are different in kind from JRI seminars. Mr. Pace states that his
18 recommended corporate protocols are "state of the art" for specialized programs like Outward
19 Bound and the National Outdoor Leadership School (NOLS). *See* Transcript of Interview of
20 Steven Pace at 10:23-27. Even within the realm of outdoor adventure education programs, Mr.
21 Pace explains that only about 50 programs nationwide have received accreditation under his
22 standards. *Id.* at 11:13. And Mr. Pace acknowledges that these are not the relevant corporate
23 standards for all recreational programs. Indeed, were it otherwise, all recreational endeavors or
24 facilities, from sports camps to corporate retreats to the animal safari park outside the courthouse
25 in Camp Verde, would be required to comply with requirements like detailed screening and
26 logistical planning or subject their employees to *individual criminal* sanction for any mishap.
27 That is not the state of the law. The corporate procedures followed by NOLS and Outward
28 Bound, no matter how laudable for the programs they administer, do not bear on how JRI should

1 or should not have run its corporate programs—let alone Mr. Ray’s individual criminal liability in
2 this reckless manslaughter trial.

3 **B. Mr. Pace’s testimony is irrelevant to any legally permissible theory of**
4 **liability.**

5 Furthermore, even if the State were to change course at this late date and allege that JRI’s
6 corporate risk management deficiencies caused the three deaths on October 8, 2009, Mr. Pace’s
7 testimony would remain irrelevant to any legally permissible theory of liability. In fact, were the
8 State to allege that corporate risk management shortcomings caused the deaths, the criminal
9 charges against Mr. Ray as an individual would have to be dismissed.

10 As an initial matter, it is not apparent that JRI had any legal duty to implement the sorts of
11 risk management protocols that Mr. Pace describes. Anyone who has taken a river rafting trip,
12 run a 10K or a marathon, gone horseback riding with an outfitter, taken a guided hunting trip,
13 trekked abroad, or participated in any manner of outdoor activity, has likely engaged a company
14 that does not adhere to the robust risk management policies Mr. Pace champions. And absent a
15 legal duty, JRI’s failure to implement such corporate protocols could not be the basis for criminal
16 liability. *See* A.R.S. §13-201 (the “minimum requirement for criminal liability is the performance
17 by a person of conduct which includes a voluntary act or the omission to perform a duty imposed
18 by law”).

19 Moreover, and critically, any such corporate shortcoming by JRI could not form the basis
20 for criminal charges against *Mr. Ray as an individual*. *See State v. Angelo*, 166 Ariz. 24, 28
21 (App. 1990) (holding that corporate officers could not be criminally liable for corporation’s
22 failure to file tax returns). Under the Due Process Clause, criminal responsibility is permissible
23 only if the defendant was provided “fair notice” of criminal penalties under “precise and definite”
24 definitions. *See id.* In light of these principles, where an individual’s conduct on behalf of a
25 corporation is at issue, Arizona courts have held that criminal penalties can be imposed “only for
26 affirmative acts.” *Id.* at 27 (construing A.R.S. §13-306, which provides that “[a] person is
27 criminally liable for conduct constituting an offense which such person performs or causes to be
28 performed in the name of or in behalf of an enterprise to the same extent as if such conduct were

1 performed in such person's own name or behalf"). No such individual affirmative act is at issue
2 here.

3 **C. Mr. Pace's testimony should be excluded pursuant to Rule 403.**

4 Finally, Mr. Pace's testimony would unfairly prejudice Mr. Ray's defense and should
5 therefore be excluded pursuant to Rule 403. Mr. Pace's testimony might be relevant to a civil
6 negligence trial seeking to impose civil damages against JRI. Properly pled and assuming
7 supporting facts, such a civil trial might even seek to impose individual civil liability against Mr.
8 Ray.

9 This, however, is a criminal reckless homicide trial against Mr. Ray as an individual. The
10 State faces a steeper burden of proof. The jury also must apply different law relating to
11 individual criminal recklessness. Introducing concepts of civil negligence and corporate
12 responsibility would confuse the jury and lead them to determine Mr. Ray's guilt or innocence on
13 inapposite and impermissible considerations. Indeed, by asking Mr. Pace whether JRI corporate
14 programs were well-run or well-managed, the State will invite jurors to consider whether JRI was
15 a commendable corporation, and, perhaps, whether they themselves would have felt safe at a JRI
16 seminar. Even a brief review of the juror questionnaires recently received by the parties reveals
17 that this confusion already exists among many potential jurors. Those are not appropriate
18 questions in a criminal homicide trial. If Mr. Ray is to have a fair trial, the State's presentation
19 must focus on whether he recklessly caused the three deaths—not whether JRI should have
20 implemented Mr. Pace's state-of-the-art corporate risk management procedures.

21 **III. CONCLUSION**

22 Because Mr. Pace's opinions have no relevance to the charged crimes and would unfairly
23 distract the jury from the issues that determine individual criminal responsibility, his testimony
24 should be excluded.

1 DATED: January 24th, 2011

MUNGER, TOLLES & OLSON LLP

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By: 

Attorneys for Defendant James Arthur Ray

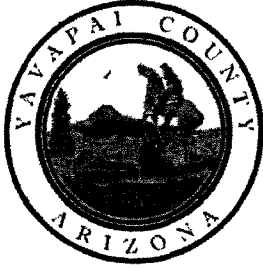
8 Copy of the foregoing delivered this 24th day
9 of January, 2011, to:

10 Sheila Polk

11 Yavapai County Attorney

12 Prescott, Arizona 86301

13 by 



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SHEILA POLK
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January 7, 2011

Luis Li
Truc T. Do
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Re: State v. Ray, Disclosure of Expert Witness Reports

Dear Ms. Do and Mr. Li:

Attached is the State's 26th Supplemental Disclosure Statement disclosing the reports of expert witnesses, Rick Ross and Steven Pace. In addition to the reports of these witnesses, the State provides the following information relating to the expected scope of their testimony and the records they reviewed related to this case.

Rick Ross

Report: "Expert Witness Report," dated January 5, 2011, Bates No. 6695-6699

Materials reviewed: The State provided Mr. Ross with a copy of the PowerPoint presentation disclosed to you at Bates No. 4894-4953. Any additional materials reviewed will be determined during his interview.

Scope of Testimony: Mr. Ross will testify about all the matters set forth in his report including Large Group Awareness Training and the "Human Potential" movement. Mr. Ross will also testify about how these techniques affect the behaviors of group participants and the Defendant's use of these techniques to influence the decisions of participants to participate and remain inside the sweat lodge. Hypothetical questions will be posed as necessary.

Steven Pace

Reports: Included in the attached disclosure are the following reports/papers produced by Steven Pace:

1. "Considerations Used to Assess Program Safety," Bates No. 6700-6704
2. "The Use of Subjective versus Objective Risk in Adventure Education," Bates No. 6705-6709
3. Draft dated 12/7/10 of "Considerations Used to Assess Program Safety," Bates No. 6710-6713

Materials reviewed: The State provided Mr. Pace with a copy of the PowerPoint presentation disclosed to you at Bates No. 4894-4953. Any additional materials reviewed will be determined during his interview.

Scope of Testimony: The State intends to call Mr. Pace as a "cold expert." As such, his reports address the considerations used to assess program safety for any adventure program. During trial, the State will question Mr. Pace regarding all the matters contained in his reports and publications; the appropriate considerations that would be used to assess the program safety for the types of events at Spiritual Warrior, including the sweat lodge ceremony; and what safety measures should have been implemented for these types of activities. Hypothetical questions will be posed as necessary.

Douglas Sundling

Reports: Mr. Sundling was not asked to prepare a new report for trial and has not been formally retained as a witness. The State may call Mr. Sundling as a rebuttal witness, and reserves the right to call him in its case-in-chief. Accordingly, the State is providing information relating to his anticipated testimony. The State has previously disclosed the following reports/websites prepared by Mr. Sundling:

1. "The Sweatlodge an Interpretation," Bates No. 5687-5704
2. "Death and a Bogus Sweatlodge," Bates No. 6683-6693
3. Douglas Sundling's website as found at <http://bogus-sweatlodge.com/index.html>, disclosed in the State's 25th Supplemental Disclosure

Materials Reviewed: Mr. Sundling received the following records through Public Records Requests:

1. Search Warrants, Affidavits and Returns w/photos taken during the execution of the warrants.
2. 911 calls and radio traffic recordings
3. YCSO DR 09-040205 and Supplements 1-150
4. Indictment & Arrest Warrant
5. Redacted Autopsy Reports

Scope of Testimony: Mr. Sundling will testify about matters contained in his publications; how a sweat lodge ceremony is typically conducted; and will contrast this information with the methods used to conduct the sweat lodge ceremonies at the Defendant's Spiritual Warrior seminars. Hypothetical questions will be posed as necessary.

Dr. Matthew Dickson

Report: The State has not received the report of Dr. Dickson. We anticipate it will be received in the near future and will be disclosed immediately.

Materials Reviewed: The State provided Dr. Dickson with the following records:

1. Autopsy Reports and Notes for Kirby Brown, James Shore and Liz Neuman
2. Medical Records for Kirby Brown, James Shore and Liz Neuman
3. Medical Records for the surviving participants: Andresano, Andretti, Bivins, Brinkley, Caci, Grain R., Grimes, Mehrava, Phillips, Rainey, Ray S., Ronan, Spencer, Veguilla and Wong
4. Selected Supplements from DR 09-040205 as follows:
 - a. 2009 Spiritual Warrior: Initial DR, Supplements 1, 2, 3, 4, 9, 10, 11, 13, 14, 19, 24, 26, 28, 34, 45, 46
 - b. 2008 Spiritual Warrior: Supplements 84, 99, 119, 121, 139, 162
 - c. 2007 Spiritual Warrior: 73, 132, 133
 - d. 2005 Spiritual Warrior: 29, 44, 87, 101, 113, 114, 152
5. Dr. O'Connor's Reports on Sidney Spencer and Dennis Mehrava
6. Daniel Pfankuch's medical records from 2005
7. The YCSO PowerPoint presentation

Scope of Testimony: Although the State has not yet received Dr. Dickson's report, the State anticipates Dr. Dickson will provide his opinion about the cause of death of the victims; all matters set forth in his report; death caused by heat; and the cause, symptoms and treatment of heat-related illnesses. Hypothetical questions will be posed as necessary.

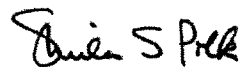
Interview Requests

Please provide Penny Cramer, my assistant, with multiple dates in January of your availability for the interviews of the listed experts and indicate whether you want to conduct the interviews telephonically or in person.

Luis Li & Truc Do
January 7, 2011
Page Four

If you have any questions or need anything further, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sheila S Polk". The signature is written in a cursive, flowing style.

Sheila Sullivan Polk
Yavapai County Attorney

Considerations Used to Assess Program Safety

In order to assess the overall safety of an organization, and the activities it conducts, one needs to scrutinize the overall risk management plan that the organization has put in place to ensure the well being of its participants, and the quality of its programming. This short paper is a synopsis of the factors that need to be considered when doing this type of review. Every area discussed should be considered but not all areas are applicable to every program.

The areas most often considered when assessing program safety and therefore addressed in this paper are: Participant screening, staff training hiring and development, management systems, program activities, emergency procedures, logistics, facilities and security, and transportation. Additional areas might be added in special circumstances.

In addition to using my own experience I reviewed a number of authoritative documents about program safety reviews.

Participant Screening

Areas to Assess

Are pre-course materials adequate in describing hazards, equipment requirements and physical conditioning?

Are adequate participant medical and psychological screening procedures in place and being followed?

Are participants required to have current medical examinations?

Are staff doing medical screening qualified to do so and supported by appropriate materials and access to expertise?

Are participants prepared physically and emotionally for each activity?

Staff Hiring, Training and Development

Areas to Assess

Are clear and appropriate standards in place for staff hiring?

Is there an adequate process for assessing compliance with these standards such as technical skills, experience, and judgment of potential staff?

Does staff exhibit maturity, good judgment, and adequate skills?

Is the program able to identify and hire sufficient adequately trained and experienced staff?

Is staff being evaluated regularly and advised on professional development needs?

Is staff trained to excuse themselves from supervising activities if they feel sick or otherwise compromised?

Is the training and orientation of staff adequate and effective?

Are the employee files complete (first aid certifications, recent training, workshops, experiences, evaluations, original application and letters of recommendations)?

If exceptions are made to hiring standards how are they authorized and how frequent are they?

Management Systems

Areas to Assess

Is there a statement of safety objectives and is it widely understood by staff?

Is there an effective safety committee of qualified people involved in safety monitoring?

Are accidents and incidents recorded and analyzed to reduce potential for injury?

Are job descriptions current, accurate and understood?

Is there an effective plan for managers and supervisors to monitor program safety?

Is there good communication, cooperation and respect among managers and staff?

Is there a management review process to authorize new programs or activities, which adequately address safety issues?

Are internal and external safety reviews conducted on a regular basis?

Are recommendations from safety reviews implemented in a timely manner?

How frequent are student complaints and how are they handled?

Are there grievance procedures in place for staff and are they followed?

Do management and staff perceive the program to be under control?

Does the organization have current liability insurance with appropriate limits?

Program Activities

Areas to Assess

What are the most hazardous activities and how are they managed?

Are safety procedures documented in a staff manual?

Is staff familiar with policies and procedures? Do they follow them?

Is the program director familiar with the activities being conducted?

Is the instructor to student supervisory ratio appropriate for the activity?

Are staff skills and the activity in line with state of the art practices? How is this assessed?

Is staff consciously anticipating hazards prior to undertaking activities?

Are students briefed on the inherent risks of the activity they are about to undertake so that they can recognize them and actively develop good judgment around self-care?

If activities take place in a remote setting do staff have the appropriate medical training to assist participants during the time it takes to get help?

Are participants properly briefed and progressively readied for each activity?

Are participants clearly briefed to let staff know if they feel physically or emotionally unsafe or unwell so that they can be excused from participating further in an activity?

Are activities appropriately sequenced so that participants have adequate rest and recuperation?

Can staff present rationale for conducting an activity?

Do staff understand the difference between subjective risk and objective risk?

Are appropriate back up and emergency systems in place?

Emergency Procedures

Areas to Assess

Are appropriate communication devices in the field, and emergency systems in place to summon help.

Are there written plans and training for field emergencies covering lost or injured participants?

Is staff trained in emergency response and rescue?

Is an appropriate first aid kit present for all activities?

Is there an emergency action plan for interacting with government agencies, media, next-of-kin and other internal and external considerations?

Are simulations conducted to practice for potential emergencies?

Logistics

Areas to Assess

Is the logistics staff satisfied that enough attention is focused on their area?

Has the program developed a professional plan for nutrition and food amounts?

Is a systematic equipment maintenance and retirement policy documented and observed?

Is the student equipment in good condition?

Is specialized safety and rescue equipment easily available and in good condition?

Physical Plant (put in different category)

Areas to Assess

All building and structures should be inspected for structural hazards and adequacy of construction. Fire extinguishers, smoke detectors, carbon monoxide detectors and fire exits should be appropriately placed. Cleanliness of food preparations areas, rest rooms and shower areas should be observed. Any obvious structural hazards should be noted.

Transportation

Although this area is very important it does not seem to be relevant to this particular case. I can elaborate on it if you would like.

Manuals / Policies and Procedures

Every program should have current staff manuals that include safety policies, and recommended program procedures. Word of mouth training is not adequate to ensure the well being of participants and the quality of programming.

Areas to Assess

Does the manual cover all program activities?

Is the manual practical and easy to use?

Is the staff familiar with the manual and the policies and procedures it contains?

Are policies in line with current state of the art practices?

Are appropriate procedures outlined for the types of emergencies that could be anticipated considering the activities that are being conducted?

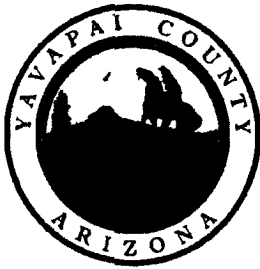
Are appropriate procedures outlined for environmental emergencies such as lightening, bees, snakes, rockfall, fires, ect.

Is there a clear policy on drug and alcohol use?

Bibliography

The Association for Experiential Education's Accreditation Standards for Adventure Programs

Program Review Manual of Outward Bound International



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SHEILA POLK
Yavapai County Attorney

January 12, 2011

Sent via email and First Class mail

Truc T. Do
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Re: *State v. Ray, opinions by Rick Ross & Steve Pace*

Dear Ms. Do:

We received your 9 January 2011 letter requesting further information about the opinions that will be expressed by Rick Ross and Steve Pace. The State primarily intends to call each witness to educate the jury about the areas of their respective specialized knowledge that relate to this case. To that end, each expert's report summarizes the specialized knowledge relevant to this case which we will ask the experts to educate the jury about.

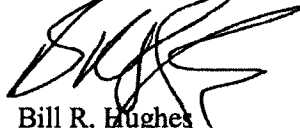
We do not intend to ask Mr. Pace to give an opinion requiring him to apply any particular facts of this case. Mr. Pace will be called as a "cold expert." Accordingly, we do not intend to ask Mr. Pace to give an opinion as to the adequacy (or lack thereof) of defendant's safety precautions in this case. Rather, Mr. Pace will provide the jury with the specialized knowledge that a reasonable adventure program leader would know as to the reasonable safety precautions and considerations that a leader of any large sized adventure program should plan for, consider, and implement.

Mr. Ross will be asked not only to educate the jury regarding Large Group Awareness Training (LGAT) and will explain to the jury the persuasive power that LGAT can hold over participants, but will be asked to apply hypothetical fact scenarios (mirroring the facts in this case) to his knowledge of LGAT. In those hypothetical questions, Mr. Ross is expected to give the opinion that defendant exerted a high level of control over the victims, and defendant's control over the victims was such that they would remain inside the sweat lodge until the sweat lodge ceremony ended, notwithstanding becoming ill.

On another note, now that we have finally received Dr. Paul's CV and report, we would like to interview Dr. Paul as soon as possible. My assistant, Penny Cramer, will be in touch with you to provide my availability.

If you have any questions or need anything, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'B. Hughes', with a large, stylized flourish extending from the end.

Bill R. Hughes
Deputy Yavapai County Attorney